

## **MDM Declaration Exhibit A-05**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

SUSANNA MIRKIN, \* Case No. 18-CV-02949 (ARR)  
*individually and on behalf* \*  
*of others similarly* \*  
*situated,* \*  
 \*  
Plaintiffs, \* Brooklyn, New York  
 \* August 27, 2020  
v. \*  
 \*  
XOOM ENERGY, LLC, et al, \*  
 \*  
Defendants. \*  
 \*  
\* \* \* \* \*

TRANSCRIPT OF CIVIL CAUSE FOR VIDEO MOTION HEARING  
BEFORE THE HONORABLE RAMON E. REYES, JR.  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: STEVEN L. WITTELS, ESQ.  
J. BURKETT MCINTURFF, III, ESQ.  
STEVEN D. COHEN, ESQ.  
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For the Defendants: DANIEL J. BROWN, ESQ.  
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1 (Proceedings commenced at 11:31 a.m.)

2 THE COURT: Good morning. This is Magistrate Judge  
3 Reyes. We are holding a video argument in Mirkin vs. Xoom,  
4 docket no. 18-CV-2949.

5 Let's start with appearances for the plaintiff. And  
6 I'll ask you to do it in order of seniority, if you will.

7 MR. WITTELS: Thank you, Your Honor. Steven Wittels  
8 from Wittels, McInturff, Palikovic for the plaintiffs and the  
9 proposed class. Good morning.

10 THE COURT: Good morning.

11 All right. You're muted.

12 MR. MCINTURFF: How about now?

13 THE COURT: Yes.

14 MR. MCINTURFF: Okay. Good morning, Your Honor.  
15 Burkett McInturff from Wittels, McInturff and Palikovic on  
16 behalf of plaintiffs in the proposed class.

17 MR. COHEN: Good morning, Your Honor. This is  
18 Steven Cohen on behalf of plaintiffs in the proposed class  
19 from Wittels, McInturff, Palikovic as well.

20 THE COURT: Counsel for the defendant.

21 MR. BROWN: Yes. Thank you, Your Honor. Daniel  
22 Brown from McCarter & English on behalf of the XOOM  
23 defendants.

24 MR. ROJAO: And Good morning, Your Honor. It's good  
25 to see you virtually. Christopher Rojao from McCarter &

1 customers. They don't allege anywhere that Boris or Susanna  
2 actually signed up to receive natural gas or that they paid  
3 anything to XOOM for natural gas. None of that's in the  
4 complaint, Your Honor. And that's all required for standing.  
5 And that's required to state a claim. And none of that's in  
6 there. So there's no claim for natural gas and, therefore,  
7 there shouldn't be any discovery pertaining to natural gas.

8 Regarding their argument that natural gas is the  
9 same as electricity, that's just not the case, Your Honor.  
10 Those are two entirely different commodities.

11 THE COURT: And so what would stop me from requiring  
12 XOOM to produce Boris' -- apparently he had some gas contract  
13 on another residential property with someone else, whoever  
14 that is -- what would stop me from ordering XOOM to produce  
15 that discovery related to his standing?

16 And then if, in fact, he was a gas customer and paid  
17 money to XOOM for gas at an inflated rate permitting the  
18 complaint to be amended and relate back to the original filing  
19 because there is allegations -- perhaps general -- that gas is  
20 involved -- paragraphs 1, 6, 66, others -- and then we have an  
21 amended class complaint for gas and electric?

22 MR. ROJAO: Thank you, Your Honor. So I'll address  
23 those points in turn.

24 In this litigation, it's unclear whether or not --  
25 we already know that Boris has signed up in other people's

1 names to receive services, so we're not sure if there is  
2 billing data relating to Boris, that Boris paid anything, or  
3 if it's in somebody else's name. So if plaintiffs want to  
4 provide that information to us as to -- if he signed up in his  
5 own name or someone else's name and who paid, we'd be happy to  
6 look for that.

7           Regarding amending the complaint, Your Honor, we  
8 would submit that the plaintiffs would need leave to file an  
9 amended complaint. And we would request a briefing on that  
10 issue because we don't believe the plaintiffs were aware of  
11 their claims previously at the time that they -- if they did  
12 receive natural gas services, they would have been aware of  
13 that. And they didn't allege that claim in this lawsuit.

14           So I think we would request briefing on whether or  
15 not plaintiffs would be entitled to relation back based on the  
16 allegations in the complaint, whether or not they're  
17 fictitious entities, all of that we would request briefing on.  
18 But we wouldn't submit that it would be appropriate at this  
19 time to simply permit an amended pleading with relation back  
20 without legal briefing on that, Your Honor.

21           THE COURT: Well, certainly XOOM had notice of the  
22 gas claim, whether it's adequately pled or not. So I don't  
23 know how they would be prejudiced were I to grant an amended  
24 pleading and allow it to relate back to the original filing.  
25 And all that does is just extend the statute of limitations

1 period, right? They could file tomorrow a new case on gas and  
2 you would have a shorter statute of limitations period, right?

3 MR. ROJAO: Well, Your Honor, they would need a  
4 plaintiff who was a natural gas customer. And they would need  
5 a plaintiff who was a natural gas customer within the  
6 limitations period tomorrow, and we submit that Boris would  
7 not be that plaintiff.

8 THE COURT: Mr. Cohen, does Boris have a gas  
9 contract with XOOM? Do you know?

10 MR. COHEN: We have the contract that defendants  
11 produced and on there is the account number. So regarding  
12 defense counsel's statement that they might not know how to  
13 find it because it might be in someone else's name, they  
14 should be able to pull it up based on the document they  
15 produced that has the account number and the address. So I  
16 don't see why that would be any difficulty on their end.

17 THE COURT: So it has an account number and address,  
18 and it has two names or one name?

19 MR. COHEN: The documents that we received, the  
20 enrollment and the contract, I believe just has Boris' name.  
21 It has his email address. It has his phone number.

22 THE COURT: Same email address and phone number that  
23 he used for the electric?

24 MR. COHEN: I believe it might be different, but I'd  
25 have to double-check.

1 XOOM, identify someone who is damaged and assert claims on  
2 behalf of that party. Without that, there is no Article 3  
3 standing in this case.

4 THE COURT: This isn't a motion to dismiss for lack  
5 of standing.

6 MR. ROJAO: I understand that, Your Honor.

7 THE COURT: This is a motion to compel discovery.

8 And I thought there was a gas contract with Mr.  
9 Mirkin.

10 MR. ROJAO: So, again, Mr. Mirkin apparently may  
11 have enrolled to receive natural gas services, but as part of  
12 this complaint, they haven't alleged that Mr. Mirkin was a  
13 natural gas customer, that he paid anything to XOOM, or that  
14 he was damaged in any way by XOOM with respect to that natural  
15 gas contract. That contract simply came up in terms of  
16 reviewing things related to the Mirkins, but there's nothing  
17 about that in the complaint.

18 THE COURT: If it's not -- if it's not relevant, why  
19 did you produce it?

20 MR. ROJAO: It's relevant to show plaintiffs' prior  
21 communications with XOOM and it's relevant to determine  
22 whether or not --

23 THE COURT: Prior communications about what, about  
24 electric, no, about gas?

25 MR. ROJAO: About signing up for -- how he signed up

1 for services, whether or not that was even him, Your Honor.

2 So we would submit that plaintiffs need to --

3 THE COURT: How he signed up for what services, gas  
4 services? How is that relevant to his electric?

5 MR. ROJAO: Well, we don't know if that was him and  
6 that's the thing. Again, he signs up --

7 THE COURT: You don't have any records on -- you  
8 don't have any records on whether he paid for gas?

9 MR. ROJAO: We have to review that, Your Honor, and  
10 that's the thing. Because the records for Susanna --

11 THE COURT: Motion to compel granted with respect to  
12 gas only.

13 Now, let's move to the customer complaints.

14 The complaint has gas all over it. I think the  
15 plaintiffs did drop the ball in not specifically breaking out  
16 their breach of contract claim, gas or electric, or having a  
17 separate breach of contract claim for gas, but in the lead up  
18 to that section, gas is all over the place. It's fair game.  
19 Putting aside whether there's standing, we're not there yet,  
20 it's relevant. The discovery request, it is relevant.

21 Federal rules are notice pleading and the I think  
22 the defendants had plenty of notice that gas was in play.

23 Why do you need these customer complaints, Mr.  
24 Cohen?

25 MR. COHEN: It's more than just the customer



1 know if that was one where there were multiple cases filed  
2 such that interim class counsel did make sense under that  
3 circumstance.

4 I just don't -- they may not have done it in that  
5 case and that may be their normal practice. I don't know.  
6 But my point is there's the -- specter's the wrong word to use  
7 -- there's the veneer, there's the gloss that this is -- that  
8 it should be more than it is. That's really our position with  
9 respect to the bootstrapping. Perhaps bootstrapping is too  
10 strong a word, but that's the concern there.

11 THE COURT: Okay. All right. I will take it under  
12 advisement and you'll know shortly.

13 MR. BROWN: Thank you, Your Honor.

14 MR. WITTELS: Your Honor, the only point is while we  
15 may not have mentioned it, I thought we did, but if we didn't,  
16 there was only one class action that was filed after ours in  
17 New Jersey in federal court after we had already been  
18 litigating it here in New York. So it wasn't multiple class  
19 actions. It was the same scenario. And Judge Levy felt that  
20 the time had come where we should be appointed and it was to  
21 protect the class's interested, which we did.

22 THE COURT: The rule itself doesn't require multiple  
23 class --

24 MR. WITTELS: No.

25 THE COURT: -- actions or even a second class action

1 to be filed before --

2 MR. WITTELS: Right.

3 THE COURT: -- interim class counsel can be  
4 appointed, right?

5 MR. WITTELS: Correct.

6 THE COURT: All right. I'll take it under  
7 advisement, gentlemen.

8 MR. WITTELS: Thank you.

9 THE COURT: (Indiscernible) 12:30 I have to go.  
10 Hopefully they're still waiting.

11 ALL COUNSEL: Thank you, Your Honor.

12 (Proceedings concluded at 12:42 p.m.)

13 I, CHRISTINE FIORE, court-approved transcriber and  
14 certified electronic reporter and transcriber, certify that  
15 the foregoing is a correct transcript from the official  
16 electronic sound recording of the proceedings in the above-  
17 entitled matter.

18  
19  
20 Christine Fiore

September

21 17, 2020

22 Christine Fiore, CERT  
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